WEE TIANG YAP

v.

CHAN CHAN BROTHERS

FEDERAL COURT, KOTA BHARU
WAN SULEIMAN FJ
GEORGE SEAH FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 180 of 1982]
27 JANUARY 1984

LANDLORD AND TENANT: *Notice to quit - Claim for vacant possession or premises - Whether tenants were trespassers - Landlord not legal owner of premises - Locus standi - Estoppel - Death of landlord before judgment - Action proceeded by son as representative of the estate of the deceased - Claim for double rent as damages for trespass.*

One Wee Phor Tin @ Wee Hian Thin (Tin) landlord of the premises No. 3599 Jalan Ismail, Kota Bahru, had issued a notice to quit on 29 December 1975 to the tenants, the respondents in this case. The notice expired on 1 March 1976. Tin then sued the respondents for vacant possession of the said premises, alleging that having received the notice, the respondents continued to hold over as trespassers.

The respondents denied that they were trespassers but alleged that they were tenants of the premises for a term of years by virtue of an agreement and counter-claimed for specific performance of that agreement. Initially Tin denied the existence of such an agreement but later admitted that there was an agreement "purporting to be a lease for 10 years". However, at the close of his case, Tin admitted that he was not the legal owner of the said premises, following which the statement of claim and the reply were amended accordingly.

Ultimately the issue before the learned trial Judge was:

> whether Wee Phor Tin was entitled to the prayers he sought in the statement of claim, and if not whether the respondents were entitled to prayers (b) of the amended claim i.e. for the refund of the rental totalling RM16,800 and (c) of the amended counter-claim i.e. the costs.

Before the judgment Tin passed away and the action was continued by his son, Wee Tiang Yap, the appellant as representative of the estate of the deceased. The learned Judge held that Tin had in fact no **locus standi** and was no longer the owner of the premises and that he cannot come to Court to assert ownership. His Lordship dismissed his claim with costs and ordered him to pay the sum of RM16,800 to the respondents under the counter-claim. Hence this appeal by Tin's son, Wee Tiang Yap.

Held:

[1] The respondents are estopped from challenging the appellant's title. They had wilfully remained on the premises even after expiry of the period of notice.

[2] The respondents were ordered to quit and deliver vacant possession of the premises within 3 months from the date of the judgment and to pay double rent from 1 March 1976, the date on which the notice to quit came into force.

[Appeal allowed with costs.]

Cases referred to:
Fatimah v. Moideen Kutty [1969] 1 MLJ 72
Cheok Lek San v. Yong Kam Chin [1970] 2 MLJ 179
Serjeant v. Nash, Field & Co. and Another [1903] 2 KB 304
Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co. Ltd. [1983] 1 MLJ 65
Crook v. Whitbread 99 LJKB 959
Krishna Prosad v. Baraboni Coal Concern [1937] AIR PC 251
Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings Industrialised Buildings Sdn. Bhd. [1980] 1 MLJ 21
Morton v. Woods [1868] LR Vol 3 671
B. Kunwar v. D. Ranjit Singh [1915] PC 96

Legislation referred to:
Evidence Act 1950, s. 116
Civil Law Act 1956, s. 28(4)(a)
Contracts Act 1950, s. 73
Landlord and Tenant Act 1730 [UK], s. 1

For the appellant - C. Jagathesan; M/s. Jagathesan & Co.
For the respondents - S. E. Rajah; M/s. S. E. Rajah & Co.

JUDGMENT

Wan Suleiman FJ:

In the trial Court one Wee Phor Tin alias Wee Hian Thin, father of the present appellant sued the present respondents for vacant possession of premises No. 3599, Jalan Ismail, Kota Bahru, alleging that they were trespassers. The respondents were previously tenants of the aforementioned Wee Phor Tin who on 29 December 1975 issued a notice to quit to respondents, the notice expiring on 1 March 1976. In his pleading Wee Phor Tin alleged that having received the notice, the respondents continued to hold over as trespassers.

The respondents denied that they were trespassers but alleged that they were tenants of the premises for a term of years by virtue of an agreement, and counter-claimed for specific performance of that agreement. In his reply Wee Phor Tin denied the existence of such an agreement and pleaded that the respondents were at all material times his monthly tenants. Later the statement of claim was amended, it being admitted that there was an agreement in writing between the parties, "purporting to be a lease for 10 years". After the close of the case for Wee Phor Tin (plaintiff in the Court below), the hearing took an unexpected turn. The former admitted that he was not in fact the legal owner of the premises. There being no objection from Counsel for the respondents the statement of claim and the reply were amended, in the appropriate places to accord with this latest admission.

In the trial Court, Counsel on both sides agreed to the following facts:

> On the date of the filing of the writ i.e. 16 March 1976, the plaintiff Wee Phor Tin was no longer the registered owner of the premises, which had been transferred to his son, Wee Tiang Yap (the present appellant) on 14 August 1974. It was also agreed that the defendants/respondents had been paying rental to Wee Phor Tin right up to August 1979. The two months' notice to quit served upon the respondents by Wee Phor Tin was dated 29 December 1975 expiring on 29 February 1976. From March 1976 up to the date of the hearing Wee Phor Tin had been accepting rentals without prejudice to the notice to quit. From August 1979 the respondents ceased paying any further rental.

The agreed issue as recorded by the learned trail Judge was therefore as follows: *a*

> Whether Wee Phor Tin was entitled to the prayers he sought in the statement of claim, and if not whether the respondents were entitled to prayers (b) of the amended claim i.e. for the refund of the rental totalling RM16,800 and (c) of the amended counter-claim i.e. the costs.

The respondents then elected not to adduce any further evidence.

Before judgment the plaintiff passed away and the action was continued by his son, Wee Tiang Yap as representative of the estate of deceased plaintiff. The learned trial Judge clearly based his decision on *Fatimah v. Moideen Kutty* [1969] 1 MLJ 72 wherein it was held that on the death of a temporary occupation land owner, his estate has no right of any kind whatsoever to the land. It was further held there that s. 116 of the Evidence Ordinance cannot prevent a tenant from contending that neither the deceased nor the widow had any title to the land. *b* *c*

In his judgment, the learned trial Judge said:

> In the instant case, the plaintiff in fact has no *locus standi*. He is no longer the owner of the premises and he cannot come to Court to assert ownership. He must come into Court on his own strength and not to rely on estoppel, which he cannot rely on anyway, in view of the legal maxim that estoppel can only be used as a shield and not as a sword. The plaintiff is now attempting to make use of it as a sword. The plaintiff's claim therefore should fail. *d*
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> Accordingly, as the plaintiff had no right whatever to the premises, he is not entitled to accept any rents after he had divested himself of the ownership of the premises. Money paid under mistake of law is recoverable under s. 73 of the Contract Act, 1950.

Accordingly, his Lordship dismissed the plaintiff's claim with costs, and ordered him to pay the sum of RM16,800 to the respondents under the counter-claim, wherein he also awarded costs against the appellant. *e*

Mr. Jagathesan for the appellant relied on a decision of this Court, *Cheok Lek San v. Yong Kam Chin* [1970] 2 MLJ 179. There certain buildings on land held under a mining lease had been originally let by a tin mining company to the respondent. In October 1965 the mining lease of the land was cancelled and the land reverted to the State. On 7 November 1966 the tin mining company purported to sell the buildings to the appellant. The respondent paid rent after demand to the appellant from 15 December 1966 to March 1968. In April 1968 he stopped paying rent and the appellant obtained a writ of distress against the respondent. The respondent applied to have the warrant of distress set aside. In the High Court the warrant of distress was set aside and the appellant thereupon appealed. It was argued on behalf of the appellant that the respondent as tenant was estopped from disputing the title of his landlord. *f* *g*

Counsel pointed out, and this was not denied, that the respondents had by asking for the "Chabutan Hakmilik" came to know of the change in ownership, i.e. from Wee Phor Tin to his son, the appellant.

It therefore followed, he argued that the respondents are prevented from denying that the appellant had title. He referred to *Cheok Lek San's* case, the relevant part of which is set out hereunder: *h*

> If the respondent had known of the defect in the appellant's title, he would have been estopped from challenging the appellant's title. This was so decided by the English Court of Appeal in *E.H. Lewis & Son Ltd. v. Morelli.* Delivering the judgment of the Court, Harman J said at page 1024: *i*

> The doctrine that a tenant may not question his landlord's title is familiar law. This is sometimes said to rest on estoppel, and, when a lease is under seal, no doubt this is so. The doctrine, however, has been extended by analogy to written, and even to oral, tenancies. It has been well described as arising by intendment of law from the relationship of landlord and tenant; see Kelly C.B. in *Morton v. Woods*, citing Lord Chemsford in *Jolly v. Arbuthnot.* We do not think it operates by estoppel strictly so called in cases where there is no writing. The belief of the tenant in his landlord's ability to grant the term is not essential. He may know or have notice of a defect in his landlord's title and yet be precluded, once he has entered and paid rent, from denying it: see *Morton v. Woods.*

Mr. Rajah for the respondents referred to *Serjeant v. Nash, Field & Co. and Another* [1903] 2 KB 304. There the lessee of premises created a yearly tenancy under which the plaintiff became tenant and occupier of the premises. On the same day the lessee mortgaged the premises by way of sub-demise without obtaining the permission of the lessor. The lease contained a covenant not to assign, underlet, or part with the possession of the premises without the consent in writing of the lessor, and a clause providing for re-entry upon breach of any of the covenants. The lessee, who had been adjudicated bankrupt, failing to pay the interest, the mortgagees appointed a receiver, to whom the plaintiff paid a quarter's rent due at the following mid-summer. Before the next quarterly rent became due the lessor issued a writ to recover possession of the premises, but the writ, which was served on the plaintiff (as occupier) and others, did not contain a statement of the ground of forfeiture. The plaintiff after appearance in that action, but before delivery of statement of claim specifying the cause of forfeiture, paid the rent falling due at Michaelmas to the receiver. He refused to pay the rent falling due at Christmas, and the receiver, under the powers given by the Conveyancing Act, 1881, distrained. In an action by the plaintiff against the receiver for a wrongful distress it was held:

> that the sub-demise to the mortgagees, without the consent of the lessor, constituted a breach of the covenant as to assignment;
>
> that the issue and service of the writ to recover possession of the premises operated as a final election by the lessor to determine the term; that to have that effect it was not necessary that the actual ground of forfeiture should be stated; the right of the mortgagees to recover rent from the plaintiff came to an end; and that the distress was in consequence illegal; and
>
> that the payment of rent to the receiver by the plaintiff, after the service upon him of the writ to recover possession of the premises, did not estop him from shewing, on a claim for subsequent rent, that the title of the mortgagees had determined, inasmuch as the mortgagees were not misled by the payment.

It will be seen that the facts in *Serjeant's* case are different and therefore the principles enunciated therein are inapplicable. We would therefore hold following *Morton v. Woods* that the respondents are estopped from challenging the appellant's title.

In his prayer the appellant sought *inter alia* to claim damages for trespass to take the form of double rent.

Section 28(4)(a) of the Civil Law Act, 1956 reads:

> Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

Our attention has also been drawn to the decision of this Court in *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co. Ltd.* [1983] 1 MLJ 65, in particular the dissenting judgment therein.

We note that the majority judgment was based on an English authority *Crook v. Whitbread* 99 LKJB 959. Under s. 1 of the English Landlord and Tenant Act, 1730 doing "wilfully" is a requirement. Our section does not contain that requirement. However, on the facts or the case in the present appeal, even if a wilful act is required, the respondents had wilfully remained on the premises after expiry of the period of notice.

Accordingly, this appeal is allowed, in terms of the prayer set out in the amended statement of claim. The respondents are ordered to quit and deliver vacant possession of the premises within 3 months of the delivery of this judgment, and to pay double rent from 1 March 1976, from which date the notice to quit came into force. Costs to the appellant here and in the Court below. Deposit to be refunded to the appellant.

George Seah FJ:

I have the advantage of reading the judgment of my brother Wan Suleiman FJ and agree with his conclusion that the appeal should be allowed. I also agree with the form of the order proposed by him. However, I would like to say a few words on the issue of estoppel.

The plaintiff, Wee Phor Tin alias Wee Hian Thin, sued the defendants. Chan Chan Brothers, for possession of a shophouse known as No. 3599, Jalan Ismail, Kota Bharu, Kelantan. The principal defence of the defendants was that at the time of the commencement of the suit the plaintiff had no title in the said shophouse and/or that the title had since been determined and in the circumstances, the plaintiff had no cause of action. This contention was upheld by the learned Judge who dismissed the suit and allowed the counterclaim of RM16,800 and costs.

This is an appeal against the whole decision of the learned Judge. However, before judgment had been delivered the plaintiff passed away and the action was continued by his son, Wee Tiang Yap, as representative of the estate of the said deceased, who is also the appellant in the present appeal.

The facts are not in dispute and may be shortly stated. In 1966, the plaintiff, Wee Phor Tin alias Wee Hian Thin was the registered owner of a shophouse known as No. 3599, Jalan Ismail, Kota Bharu, Kelantan. On or about 1 March 1966 the plaintiff purported to sublet the whole of the said shophouse to the defendants, Chan Chan Brothers for a period of ten years with effect from 1 February 1966 at a monthly rental of RM280. Following the execution of this alleged sublease the defendants went into possession of the said shophouse and paid the monthly rental to the plaintiff. Under the provision of s. 116 of the Evidence Act 1950 the defendants are clearly estopped from disputing the title of the plaintiff at the commencement of the sublease. On 29 December 1975 the plaintiff caused a notice to quit to be served on the defendants requesting them to vacate from the said shophouse by the end of February 1976, and when the defendants failed to leave the plaintiff took out proceedings on 17 May 1976 in the Sessions Court at Kota Bharu for an order for vacant possession and damages for trespass. However, by consent of the parties the action was transferred to the High Court for trial. After the receipt of the notice to quit the defendants made a search at the Land Registry Office on 31 December 1975 and discovered that the registered owner of the said shophouse was Wee Tiang Yap, the son of the plaintiff. It was common ground that the plaintiff transferred the legal ownership of the premises to his son on 14 August

1975. Despite notice and knowledge of the change of ownership the defendants continued to tender and pay the monthly rental of RM280 of the said shop house to the plaintiff, who not only accepted it but also issued rent receipts made out in the name of the defendants until February 1976.

Now, the leading authority for the proposition that a tenant is not prevented from pleading that the title of the original landlord has since come to an end is the Privy Council case of *Krishna Prosad v. Baraboni Coal Concern* [1937] AIR PC 251. In my opinion, this case does not establish or attempt to establish any new principle of law but only lays down a rule of evidence. In other words, notwithstanding the doctrine of estoppel contained in s. 116 of the Evidence Act 1950 a tenant may plead that the title of the landlord has come to an end *(Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings Industralised Buildings Sdn. Bhd.* [1980] 1 MLJ 21 at p. 24. It follows that the mere fact that the plaintiff was no longer the registered owner of the said shophouse at the time of filing of suit was quite irrelevant. The question to be considered by the learned Judge was: What was the relationship of the plaintiff and the defendants after 31 December 1975? The documentary evidence showed that after the defendants had notice and knowledge that the plaintiff's title had come to an end they continued to recognise the plaintiff as their landlord by tendering and paying the monthly rental to him and rent receipts were made out in the name of the defendants as tenants by the plaintiff until February 1976. In the case of *Cheok Lek San v. Yong Kam Chin* [1970] 2 MLJ 179 the Federal Court had to consider these questions and this is what Suffian Ag. LP (as he then was) had to say at page 180:

> If the respondent had known of the defect in the appellant's title, he would have been estopped from challenging the appellant's title. This was so decided by the English Court of Appeal in *E.H. Lewis & Sons Ltd. v. Morelli* [1948] 2 AER 1021. Delivering the judgment of the Court Harman J said at p. 1024:
>
> > The belief of the tenant in his landlord's ability to grant the term is not essential. He may know or have notice of a defect in his landlord's title and yet be precluded, once he has entered and paid rent, from denying it *(Morton v. Woods* LR 4 QB 304).

Similar view was held by the Privy Council in the *Baraboni Coal Concern* case at page 255 where Sir George Rankin in giving the judgment said:

> What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect of title...

I would therefore decide this appeal in favour of the appellant on the simple ground that the respondents are estopped from disputing the title of the plaintiff on the authority of *Cheok Lek San (supra)* and *Baraboni Coal Concern (supra)*. Since the counterclaim of the respondents is based on a refund of the sum of RM280 per month from 1 September 1974 to 1 September 1979 paid by the respondents to the plaintiff allegedly under a mistake of law and/or fact, it follows that having regard to the conclusion reached by this Court, the counterclaim ought therefore to be set aside, as being devoid of merits.

Hashim Yeop Sani FJ:

The following facts are not disputed. The transfer of ownership of the premises from the appellant to the son took place in 1974. The respondents were served with the notice to quit dated 29 December 1975. At first the respondents purported to rely on the protection of the Control of Rent Act 1966 and it was only in the amended statement of defence long after

the writ was filed did they raise for the first time the question of title. The respondents had known about the transfer of ownership some time in December 1975 but despite the notice to quit respondents continued to tender the rents to the plaintiff without qualification or reservation.

In a letter from their solicitors dated 23 December 1975 to the plaintiff (11 in AB) responding to the notice to deliver vacant possession by February 1976 the respondents purported then to invoke the protection of Control of Rent Act 1966 but admitted however in the letter that "our clients are tenants" and "you are the landlord". Another letter dated 7 February 1976 (18 in AB) from the respondents to the solicitors of the plaintiff reads as follows:

> Dear Sir,
>
> **Chan Chan Brothers**
>
> We enclose a cheque for RM280 being rental for the month of February 1976, as the landlord, who usually comes and collects rent, has failed to do so.
>
> Kindly do the needful.

Payments of rental to the plaintiff continued even after expiry of the notice to quit in February 1976, and continued in fact until August 1979.

In my view *Cheok Lek San v. Yong Kam Chin* [1970] 2 MLJ 180 is a clear case of attornment by the tenant after expiry of the lease and the tenant having no knowledge that the title had been determined. In the instant case however the real basis of the estoppel would seem to lie in the acknowledgment of a subsisting tenancy with full knowledge that the title had since been determined.

A tenant cannot deny that the person by whom he is let into possession had title at that time; but he may shew that subsequently such title is determined by transfer or otherwise. This rule which has been well established in many English cases was adopted by this Court in *Fatimah v. Moideen Kutty* [1969] 1 MLJ 72. The instant case however should be distinguished by the absence of an adverse claim and the fact that the respondents continued acknowledgment of the tenancy by the payment of rentals to the appellant after November 1975. It is clear in my opinion that the tenancy continued to subsist as between the appellant and the respondents.

One of the objections raised in *Morton v. Woods* [1868] LR Vol. 3 671 was that as to a part of the premises the mortgagor had no legal estate but only an equity of redemption, so that the mortgagees had no legal reversion to sustain the distress and this prevented the doctrine of estoppel from applying. In his supporting judgment Lush J replied to the objection as follows:

> But this argument proceeds, as I apprehend, on a misapprehension of the foundation on which the doctrine rests; which is, that inasmuch as the parties have agreed that they should stand in the relation of landlord and tenant, and the one accordingly receives possession from the other and enters on the premises, so long as he continues in possession he cannot be heard to deny the state of facts which he has agreed shall be taken as the basis of the arrangement; in other words, he cannot set up that the landlord has no legal title.

However the tenant is only estopped so long as the enjoyment continues. If the tenant be evicted by a superior title he is no longer estopped as it would be unjust that he should continue to be liable to pay rent when the title of the other is put to an end.

The estoppel of a tenant is founded upon the contract between him and his landlord. The estoppel applies to a tenant holding over after a notice to quit. A tenant who had been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord. In *B. Kunwar v. D. Ranjit Singh* [1915] PC 96 Sir George Farwell said at p. 98:

> The other point in the case is one of estoppel. The property was let by the plaintiff to defendant Ranjit Singh; he was let into possession by the plaintiff's gardener Bhairon, on her behalf and by her direction, and he regularly paid rent to her and applied to her to do all the necessary repairs; he has never given up possession to her although he duly received notice to quit, and he has denied her title. Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord.

Since the right to determine a continuing tenancy by a notice to quit is an inseparable incident to the tenancy, there is therefore no question here that the notice to deliver vacant possession dated 29 December 1975 was valid and effective. I agree therefore that the appeal should be allowed in the terms of the main judgment.

Also found at [1984] 1 CLJ 156